5-18-1976

David Joe White v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0315

APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-315

DAVID JOE WHITE — APPELLANT

VS.

APPEAL FROM PERRY CIRCUIT COURT
HON. DON A. WARD, JUDGE
INDICTMENT NO. 3098

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed, postage prepaid, to Hon. Don A. Ward, Judge, Perry Circuit Court, Perry County Courthouse, Hazard, Kentucky 41701; Hon. Tolbert Combs, Commonwealth Attorney, 33rd Judicial District, Hazard, Kentucky 41701; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 10th day of May, 1976.

Timothy T. Riddell

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MAY IT PLEASE THE COURT:

STATEMENT OF QUESTION PRESENTED

SHOULD THE JUDGMENT IN APPELLANT'S CASE BE VACATED BECAUSE OF THE FAILURE OF THE COURT BELOW TO FOLLOW THE SENTENCING PROCEDURES OF KRS 533.010?

STATEMENT OF THE CASE

On May 28, 1975, Appellant, David Joe White, was indicted by the Perry Circuit Grand Jury (Indictment No. 3098; T.R., pp. 2-3). Appellant was charged with murdering George Deaton by shooting him with a rifle on or about April 3, 1975 (T.R., p. 2).

On the 14th day of July, Appellant, through his appointed counsel, Hon. Ronald G. Combs, waived formal arraignment and entered a plea of not guilty to the charge in Indictment No. 3098 (T.R., p. 12). Appellant's trial date was set for November 12, 1975 (T.R., p. 13).

Because of some undisclosed trouble in selecting a jury, the taking of testimony for Appellant's trial did not begin until November 17, 1975 (T.R., p. 19).

That testimony disclosed that in April 1975, Appellant, a Kentucky born Chicago resident, returned to his native state to find a job (Transcript of Evidence hereinafter T.E., pp. 36-37). The testimony further established that Appellant, while repairing his car in Combs, Kentucky, received a frantic call for help from his aunt, Ruby Fugate (T.E., p. 38). It seems that Appellant's aunt was involved in a recurring neighborhood squabble in Bulan, Kentucky. Ruby's plea for assistance did not go unheeded for Appellant, Appellant's brother Darrell and Glenn Fugate, Ruby's son, soon arrived on the scene of the fray (T.E., p. 38). What really transpired after that may never be known for the testimony of the witnesses for the Commonwealth differed substantially on almost every point from that of the witnesses for Appellant.

The Commonwealth's witnesses testified that Appellant arrived at Bulan with his two cohorts while the fray was still on and that they brought with them "shot guns and rifles" (T.E., p. 5). Next Charlie Fugate, Ruby's husband, allegedly called George Deaton, the decedent, "a bad name" (T.E., p. 6). George and Charlie began to fight and soon rocks were being hurled (Id.). Charlie then allegedly ordered his son Glenn to bring him a shotgun which Glenn dutifully did (Id.). George allegedly began to run to safety (Id.). Charlie could not get the shotgun to work so he allegedly yelled at Appellant to shoot George (Id.). According to the Commonwealth's witnesses Appellant then fired at George and fatally wounded him (Id.). Those witnesses also testified that George never had a gun during the fray (T.E., pp. 6-7).

Appellant and his witnesses testified quite differently. They testified that after Charlie's shotgun failed to work George went to his trailer across the road and brought back a pistol (T.E., p. 39). At that time George allegedly fired "two or three shots" at Charlie and Glenn who ducked behind some cars (Id.). George then allegedly shot one more time at them and then turned his attention to Appellant and his brother (Id.). George allegedly shot twice at Appellant and Darrell; the first bullet kicked dirt in Appellant's face while the second whistled by Appellant's head (Id.). In an attempt to protect himself Appellant shot one shot back at George (Id.). Unfortunately that one shot (everyone who testified agreed that Appellant only fired one shot) fatally wounded George.

The trial court's instructions to the jury encompassed murder, first degree manslaughter, second degree manslaughter, reckless homicide and an instruction on Appellant's theory of the case - self defense and defense of others (T.R., pp. 21-23). The jury returned a verdict finding Appellant guilty of manslaughter in the first degree and fixed his punishment at ten (10) years (T.R., p. 23).

Appellant's appellate counsel must candidly admit that up until the imposition of Appellant's sentence by the trial judge that no errors of reversible magnitude occurred during Appellant's trial. However, it is apparent from a close reading of the record that the court below, in imposing the sentence in Appellant's case, failed to follow the requirements of KRS 533.010 in regards to whether or not Appellant should have been probated. Before beginning his argument, Appellant will again candidly admit that the relief that Appellant is seeking is not a new trial. The error complained of is not of that magnitude. Appellant is merely asking that this Court vacate the judgment entered against him and further that this Court

send Appellant's case back to the Perry Circuit Court so that Appellant may be sentenced properly under KRS 533.010.

ARGUMENT

THE JUDGMENT IN APPELLANT'S CASE SHOULD BE VACATED BECAUSE THE COURT BELOW FAILED TO FOLLOW THE SENTENCING PROCEDURES OF KRS 533.010.

The Legislature in 1974 in enacting KRS 533.010 established a policy in favor of rehabilitating convicted felons within the community while they are free of incarceration. KRS 533.010, COMMENTARY (1974). Nothing could demonstrate this more than the language of the statute:

> (1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation or conditional discharge as provided in this chapter.
>
> (2) Before imposition of a sentence of imprisonment the court shall consider the possibility of probation or conditional discharge. After due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant, probation or conditional discharge should be granted unless the court is of the opinion that imprisonment is necessary for protection of the public because:
>
> (a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime; or
>
> (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or
>
> (c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime. (Emphasis supplied).

Two important changes in our old scheme of probation have resulted from that statute. The trial court now has an affirmative duty to consider placing an offender on probation or conditional discharge. KRS 533.010(1). That offender no longer has to so move the court. Second, and most important, the trial court is mandated to place an offender on probation or conditional discharge "unless the court is of the opinion that imprisonment is necessary for protection of the public." KRS 533.010(2). The Legislature provided the trial courts with strict guidelines to determine whether such imprisonment is necessary. See KRS 533.010(2)(a-c). It is clear that the Legislature intended that the existence of these three criteria be a condition precedent to the imposition of any sentence of imprisonment.

As Ms. Brickey points out in her treatise on criminal law, KRS 533.010 "affords an opportunity for the court to evaluate individually each offender coming before it and to select the most appropriate alternative." Brickey, Kentucky Criminal Law §29.07(1).

The record in the case at bar is devoid of any indication that the trial court evaluated Appellant individually or that the trial court found that there was a "substantial risk" that Appellant would commit another crime while on probation or that Appellant was in need of the type of correctional treatment that could only be provided in a correctional institution or that placing Appellant on probation would "unduly depricate" the seriousness of his crime. (See Judgment T.R., p. 24).

In the absence of any such indication it can only be assumed that the court below failed to heed the mandate of the Legislature by neglecting to follow the sentencing procedures of KRS 533.010. Since following these procedures is a

condition precedent to the imposition of a valid sentence, this Court should vacate the judgment in Appellant's case and remand it to the Perry Circuit Court with directions to utilize the provisions of KRS 533.010 in sentencing Appellant.

Respectfully submitted,

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